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No. 00-1323

In The

Supreme Court of the United States

RUSSELL BRIDENBAUGH, JIM DAVIS, JOHN DAVIS, MELISSA DAVIS, WILLIAM H. FRIDAY, GREGORY KASZA, JOSEPH KEOUGH, LOYCE KEOUGH, DAVID SABBAGH, JOHN SCANLAN, LINDA SIMON, ROBERT SWANSON, AND MARTHA SYKES,

Petitioners,

v.

STEVE CARTER, ATTORNEY GENERAL OF INDIANA; AND GLENN LAWRENCE, DIRECTOR OF THE INDIANA ALCOHOLIC BEVERAGE COMMISSION, IN THEIR OFFICIAL CAPACITIES; AND WINE & SPIRIT WHOLESALERS OF INDIANA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION OF DAVID LUCAS AND JUANITA SWEDENBURG FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF AND BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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MOTION OF DAVID LUCAS AND JUANITA SWEDENBURG FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

David Lucas and Juanita Swedenburg have requested the consent of the parties to file an *amicus curiae* brief in opposition to the Petition for a Writ of Certiorari. The petitioner has declined to consent, and the respondents have not responded to the request.

Therefore, pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, David Lucas and Juanita Swedenburg hereby move this Court for leave to file the following *amicus curiae* brief in opposition to the Petition for a Writ of Certiorari.

The *amici* are the proprietors of two small, family-owned wineries located in Virginia and California, respectively. They are plaintiffs in *Swedenburg v. Kelly*, No. 00 Civ. 778 (S.D.N.Y., filed February 3, 2000), referenced in the Petition for Writ of Certiorari at 4. They are challenging New York's three-tier system of alcohol distribution, as it applies to prohibit out-of-state wineries from selling and shipping wine to New York consumers, as a violation of the Commerce Clause, U.S. Const. art. § 8. cl. 3; and the Privileges and Immunities clause, U.S. Const. art. 4, § 2, cl. 1. See *Swedenburg v. Kelly*, 2000 U.S. Dist. LEXIS 12758 (S.D.N.Y. Sept. 5, 2000) (denying motion to dismiss).

The object of *amici*'s lawsuit – to remove protectionist, discriminatory barriers to the interstate trade of wine – is the same as the objective sought by the lawsuit here. As a result, *amici* have a direct and tangible stake in the

outcome of the present litigation and in the decision by this Court whether to grant the Petition. In addition, the granting of this motion will not cause any harm or prejudice to any other party or *amicus*. David Lucas and Juanita Swedenburg's motion for leave to file an *amicus curiae* brief in opposition to the petition for a writ of certiorari in this case should accordingly be granted.

Respectfully submitted,

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INTEREST OF *AMICI*

As set forth in the motion for leave to file this brief, *amici* are the proprietors of two small, family-owned wineries located in Virginia and California, respectively.[1] They are plaintiffs in *Swedenburg v. Kelly*, No. 00 Civ. 778 (S.D.N.Y., filed February 3, 2000), referenced in the Petition for Writ of Certiorari at 4. They are challenging New York's three-tier system of alcohol distribution, as it applies to prohibit out-of-state wineries from selling and shipping wine to New York consumers, as a violation of the Commerce Clause, U.S. Const. art. § 8. cl. 3; and the Privileges and Immunities clause, U.S. Const. art. 4, § 2, cl. 1.[2] See *Swedenburg v. Kelly*, 2000 U.S. Dist. LEXIS 12758 (S.D.N.Y. Sept. 5, 2000) (denying motion to dismiss).

The object of *amici*'s lawsuit – to remove protectionist, discriminatory barriers to the interstate trade of wine – is the same as the objective sought by the lawsuit here. As a result, *amici* have a direct and tangible stake in the outcome of the present litigation and in the decision by this Court whether to grant the Petition.

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[1] This brief was not authored, in whole or in part, by counsel for a party. No person or entity, other than the *amici curiae* and their counsel, made a monetary contribution to the preparation or submission of the brief.

[2] They also challenge restrictions on speech relating to products and sales as a violation of the First Amendment.

ARGUMENT

THIS CASE IS NOT THE APPROPRIATE VEHICLE FOR THIS COURT TO ADDRESS THE IMPORTANT QUESTION OF WHETHER A STATE MAY ENACT PROTECTIONIST AND DISCRIMINATORY BARRIERS TO DIRECT INTERSTATE SALES AND SHIPMENTS OF WINE.

Amici agree with petitioners that this case presents important issues going to the central purpose of the Commerce Clause: the eradication of parochial trade barriers among states. *The Federalist* No. 22 (Hamilton). Hence, as this Court has held repeatedly, "If a state law purporting to promote [legitimate] purposes is in reality 'simple economic protectionism,' we have applied a 'virtual per se rule of invalidity'." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981) (citations omitted). As petitioners point out, the plethora of trade barriers prohibiting the direct interstate sale and shipment of wine has led to a multiplicity of lawsuits challenging their constitutionality (Pet. 4).

We also agree that the decision below is wrongly decided. Announcing that "our guide is the text and history of the Constitution, not the 'purposes' or 'concerns' that may or may not have animated its drafters," *Bridenbaugh v. Freeman-Wilson*, 237 F.3d 848, 850 (7th Cir. 2000), the court of appeals declined to apply this Court's most on-point precedents vindicating the respective core purposes of the Commerce Clause and the 21st Amendment. See, e.g., *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984) ("The central purpose of [the 21st Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition").

The court of appeals acknowledged that the state's defense of the direct shipping ban amounted to "a euphemism for reducing competition and facilitating tax collection." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d at 851. However, its novel framework for constitutional interpretation allowed the court to reach a disturbing result: permitting a state to impose a substantial burden on interstate trade based on the loss of tax revenue that might occur if the products at issue were allowed to flow freely across state lines, asserting that "this is precisely what the [21st Amendment] is for." *Bridenbaugh v. Freeman-Wilson*, 237 F.3d at 854. The court's ruling is sharply at odds with this Court's holding that the thirst for tax revenue is not a justification for parochial barriers that discriminate against or unduly burden interstate commerce. See, e.g., *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Especially in an era of explosive growth in the means of effectuating interstate commerce, such an apparently unprecedented decision could bode seriously adverse consequences.

But troubling and potentially far-reaching as the ramifications of the circuit court's reasoning may be, we believe the Court should await one of the other half-dozen cases presently in litigation to resolve the important issues at stake. For the reasons stated below, this case presents analytical and procedural impediments to a comprehensive decision on the intersection between the constitutional guarantee of freedom of commerce and the state's core powers under the 21st Amendment.

1. No direct circuit split yet exists. As noted above, the decision below stands in direct conflict with U.S. Supreme Court precedents regarding the respective

boundaries of the Commerce Clause and the 21st Amendment. Moreover, in contrast to the Seventh Circuit, other courts of appeals have followed Supreme Court precedents to strike down protectionist trade barriers relating to alcoholic beverages against claims that they were justified by the 21st Amendment. See, e.g., *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994); *Loretto Winery, Ltd. v. Duffy*, 761 F.2d 140 (2nd Cir. 1985). However, the Seventh Circuit is the first ruling precisely on the constitutionality of prohibitions against interstate sales and shipments of wine. Given the multiplicity of actions pending in district courts around the country raising the same issue, it may be prudent for the Court to wait and see how other courts of appeals address the issue, so as to more precisely frame the issue for resolution.

2. The plaintiffs are not wineries, which raises standing issues. In this action, unlike most of the other pending challenges to direct shipping barriers, the plaintiffs are solely in-state consumers and do not include out-of-state wineries. This anomaly presents the court of appeals with difficult questions of standing. As the Seventh Circuit found, consumers unquestionably possess standing under the Commerce Clause to challenge parochial state trade barriers, because "every interstate sale has two parties. . . . " *Bridenbaugh v. Freeman-Wilson*, 227 F.3d at 850. But the issue of redressability gave the court pause, because the plaintiffs did not challenge the additional requirement that out-of-state sellers obtain permits to distribute alcohol, and it is not clear that such permits are available to out-of-state producers or that such sellers would attempt to obtain them. That meant that an impediment to direct wine shipments would remain in place

even if the challenged statutes were removed. *Id.* at 850-51. Although the court correctly resolved the issue in favor of consumer standing, the only reason that the issue was raised at all is because no wineries appear as plaintiffs. This Court can confront the substantive issue without having to consider the procedural thicket if it waits for a case in which wineries, or wineries and consumers, appear as plaintiffs to challenge the trade barriers.

3. The question of discrimination is not clear. As this Court emphasized in *Clover Leaf*, 449 U.S. at 471, even an incidental burden on commerce triggers scrutiny under the Commerce Clause; but discriminatory burdens trigger a virtual per se rule of invalidity. Cf. *North Dakota v. United States*, 495 U.S. 423, 488 (1990) (Scalia J. concurring) (noting the analytical difference between discriminatory and nondiscriminatory burdens in the context of alcohol distribution). Here, the question looms whether the challenged statutes merely place a burden on interstate commerce or actually discriminate against it. The district court found that "these statutes on their face discriminate against out of state commerce." *Bridenbaugh v. O'Bannon*, 78 F. Supp. 2d 828, 832 (N.D. Ind. 1999). By contrast, the court of appeals asserts that there is no discrimination and that "Indiana insists that every drop of liquor pass through its three-tiered system. . . . " *Bridenbaugh v. Freeman-Wilson*, 227 F.3d at 853.

The court of appeals' assertion of nondiscrimination is plainly belied by the facts, given that "holders of Indiana wine wholesaler or retail permits may deliver directly to consumers' homes," *id.*, which is a privilege that out-of-state producers, wholesalers, and retailers do not enjoy. But the court of appeals notes that

> plaintiffs are consumers, and that the statutory conflict does not disable any wholesaler from importing liquor to Indiana and reselling to consumers. Plaintiffs do not complain about the statute that apparently limits distribution permits to Indiana's citizens. These plaintiffs are concerned only with direct shipments from out-of-state sellers who lack *and do not want* Indiana permits.

Id. at 854 (emphasis in original).

It seems apparent that a statutory scheme that treats out-of-state and in-state sellers differently is inherently discriminatory. But because the plaintiffs here are consumers, not wineries, the court was able to somehow transform a discriminatory statute into a nondiscriminatory one. While we disagree with the court's sleight of hand, the issue of discrimination would be more crisply presented if it were raised by a winery, whose desire to ship directly to out-of-state consumers is statutorily unrequitable while in-state sellers may obtain the privilege to do so. That factual scenario is presented in other pending cases but not here.

4. No privileges and immunities claim is presented. No claim is raised here under the Privileges and Immunities Clause. As this Court declared in *Toomer v. Witsell*, 334 U.S. 385, 396 (1948), "one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on the terms of substantial equality with the citizens of that State." That is precisely what is occurring in this case – but because plaintiffs are consumers, not out-of-state businesses, they cannot allege it.

Although the Privileges and Immunities Clause and the Commerce Clause have "a mutually reinforcing relationship," see *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978), they are analytically distinct. For one thing, Congress cannot expand state authority as against the privileges and immunities of citizenship, as it can in exercising authority under the Commerce Clause. For another, the 21st Amendment limits the scope of the dormant Commerce Clause, but it does not limit other constitutional protections. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976). Hence with regard to privileges and immunities, there is no question, as there is in the interstate commerce context, of the respective spheres of two constitutional provisions: the Privileges and Immunities Clause retains its full vitality. This Court should await an opportunity to consider a Privileges and Immunities challenge; or at least to inform its Commerce Clause analysis with an appreciation of the limits that the Privileges and Immunities Clause necessarily places upon the 21st Amendment.[3]

5. The record does not seem sufficient to review the court of appeals' conclusion regarding taxation. It is not clear whether the Seventh Circuit employed casual Commerce Clause scrutiny because of its determination that the Indiana statutes were nondiscriminatory; or alternatively whether it determined that the state's interest in

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[3] Indeed, the Privileges and Immunities Clause provides additional and independent support for the Court's recognition in *Bacchus Imports* and elsewhere that the 21st Amendment does not create a safe constitutional harbor for protectionist state regulations of interstate commerce in alcoholic beverages.

tax revenue is sufficient to overcome the virtual per se rule of invalidity that is triggered by a discriminatory trade barrier. Either way, however, plainly the crux of its holding is that Indiana's statutory scheme "channels [out-of-state wineries'] sales through Indiana permit-holders, enabling Indiana to collect its excise tax equally from in-state and out-of-state sellers." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d at 854. Even if this is a permissible basis for burdening or discriminating against interstate trade – a dubious and novel proposition – it is not clear whether the record supports the conclusion. The district court opinion makes no findings on whether the state might have alternative means – such as use taxes or permit fees – that might fulfill its revenue goals in a manner that is less burdensome to interstate commerce; and although the court of appeals concludes that this is the "one real economic effect" of the challenged scheme, *id.*, neither it nor the district court cites anything other than the statutes themselves for their determinations of economic effect. Were this Court to consider the tax revenue issue to be in play as a defense to the trade barrier, at best it would have to remand the case for further factual development on the real economic effects and the existence or lack thereof of less burdensome alternatives.

CONCLUSION

We ardently agree with petitioners that this case raises important issues of free trade, and that the decision below contradicts precedents of this Court and visits a manifest injustice upon both producers and consumers. We believe, however, that numerous aspects of this case

counsel the Court to await a different case that more crisply presents the important issues arising from pervasive parochial barriers now afflicting the interstate wine trade. Given the multiplicity of pending challenges to such barriers, the Court should not have to wait long for a better case.

Respectfully submitted,

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